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7 BEFORE THE OFFICE OF THE INSURANCE COMMISSIONER
8 OF THE STATE OF WASHINGTON
9

10 In The Matter Of The Application Regarding
11 The Conversion And Acquisition Of Control
12 Of Premera Blue Cross And Its Affiliates
13
14

No. G02-45

INTERVENERS' MOTION FOR
AUTHORIZATION TO DISCLOSE
ATTORNEYS EYES ONLY
INFORMATION TO INTERVENERS'
CONSULTANT, AARON KATZ

15 In accordance with the Insurance Commissioner's Eighth Order:
16 Protective Order, Interveners' seek authorization to disclose to their consultant, Mr.
17 Aaron Katz, the "Attorneys Eyes Only" information contained in the OIC Staff Experts'
18 Reports, Premera's Expert Reports, the Expert Report submitted by the Washington
19 State Hospital Associations ("the Larsen Report") and the documents obtained from
20 Premera by the Interveners' First Request for Production of Documents.
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22 **I. FACTS**

23 Consistent with the provisions of the Protective Order, Premera's counsel
24 was notified of Interveners intent to disclose the AEO designated information in the
25 OIC Experts' reports, Premera's Reports and the Larsen Report to Mr. Katz on
26 November 11, 2003. Declaration of Rick Spoonemore ("Spoonemore Decl."), ¶2. A

1 copy of the Appendix A declaration signed by Mr. Katz was also provided to
2 Premera's counsel. *Id.*

3 On November 12, 2002, Premera's counsel, Tom Kelly, objected to
4 disclosure of this information to Mr. Katz, via email communication. Spoonemore
5 Decl., ¶3. In this email, Mr. Kelly did not provide any reason for objecting to
6 disclosure of AEO information to Mr. Katz. *Id.*

7 After additional email correspondence on November 13, 2003, Mr. Kelly
8 identified two reasons for his objection to the disclosure of AEO information to Mr.
9 Katz: (1) Mr. Kelly questioned "whether Mr. Katz is currently or regularly employed
10 or engaged by persons or entities that compete directly or indirectly with Premera,"
11 (despite having received a copy of Mr. Katz's Appendix A declaration, which indicates
12 that Mr. Katz is not currently or regularly employed or engaged by persons or entities
13 that compete directly or indirectly with Premera); and (2) Mr. Kelly objected to the
14 provision of AEO information to Mr. Katz since he "wrote his report without looking at
15 any of Premera's Confidential or AEO documents...there is no reason to think that he
16 needs any AEO documents now."¹ Spoonemore Decl., *Exh. A.*

17 In response to these objections, Interveners first indicated that Mr. Katz is
18 not currently or regularly employed or engaged by persons or entities that compete
19 directly or indirectly with Premera; and that, in addition to providing expert testimony,
20 Mr. Katz is assisting counsel as a consulting expert to provide support, advice,
21 suggestions and ideas to Interveners' counsel in analyzing the expert reports of the OIC
22 and Premera. Furthermore, Interveners disclosed that Mr. Katz may be called upon to
23 offer rebuttal testimony, to the extent allowed by the Commissioner. Spoonemore
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25 ¹ Mr. Katz, is the director of the Health Policy Analysis Program, which produced the expert report
26 submitted by the Interveners on November 10, 2003.

1 Decl., *Exh. B*. Premera refused to remove its objection, and the parties agreed that the
2 issue was ripe for a motion.

3 II. ARGUMENT

4 Under the Insurance Commissioner's Eighth Order, if there is a dispute
5 among the parties regarding the disclosure of AEO or Confidential information, the
6 party seeking disclosure may bring before the Special Master a motion for
7 authorization to disclose AEO or Confidential information. Eighth Order at 17,
8 lines 7–9. When the disputed disclosure involves the expert or consultant of the party
9 requesting the disclosure, then the burden is on the objecting party to prove the
10 "inappropriateness" of the disclosure. *Id.* at line 11–14.

11 According to the Eighth Order, AEO and confidential information should
12 only be used for purposes of the administrative proceeding before the Insurance
13 Commissioner. *Id.* at 17–18. Experts and consultants must complete an Appendix A
14 declaration in order to be authorized to receive AEO or Confidential information.
15 Additionally, the Eighth Order specifically provides that no expert or consultant that
16 receives AEO or Confidential information may be currently or regularly employed or
17 engaged by persons or entities that compete directly or indirectly with Premera. *Id.* at
18 20, lines 17–24.

19 Aaron Katz and the Interveners' counsel have complied with all of the
20 requirements for disclosure of AEO and confidential information under the Eighth
21 Order. Mr. Katz has completed an Appendix A declaration, which was provided to
22 Premera's counsel. Mr. Katz is not currently or regularly employed or engaged by
23 persons or entities that compete directly or indirectly with Premera. Mr. Katz is both a
24 testimonial expert and consultant to the Interveners' counsel, and it is appropriate that
25 he be authorized access to AEO and confidential information.

1 On December 20, 2002, the Premera Watch Coalition announced that it
2 intended to hire the Health Policy Analysis Program at the University of Washington
3 to conduct a health impact study of the proposed conversion. See Declaration of
4 Eleanor Hamburger filed on December 20, 2002. Interveners wanted to ensure that the
5 entire HPAP study would be available to the public. Accordingly, Interveners went to
6 great lengths to ensure that no confidential or AEO information would be provided to
7 HPAP before the HPAP report was submitted.

8 Now that the HPAP report has been submitted, Interveners have retained
9 Mr. Katz individually as an expert consultant for the purpose of assisting Interveners'
10 counsel in analyzing the reports submitted by the other parties in the case, assisting in
11 the preparation of cross-examination of Premera's experts, and providing testimony, as
12 necessary.²

13 In its objection, Premera argues that Interveners' choice to wait until after
14 the submission of expert reports is a "breach of deadline." Contrary to Premera's
15 objection, there is no requirement in the Eighth Order, nor in any subsequent Order by
16 the Insurance Commissioner that access to AEO and Confidential information must be
17 sought before the submission of expert reports. Premera fails to demonstrate any basis
18 for its objection.

19 III. CONCLUSION

20 Interveners' counsel request that Mr. Katz be authorized to receive access
21 to AEO and confidential information, as described in the Eighth Order.
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25 ² The Insurance Commissioner's Thirteenth Order provides for the submission of responsive
26 testimony by January 5, 2004.

1 Dated: November 25, 2003.

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3 SIRIANNI YOUTZ
4 MEIER & SPOONEMORE

5 By: /s/
6 Richard E. Spoonemore, WSBA #21833
7 Attorney for Interveners Washington
8 Citizen Action, American Lung
9 Association of Washington, Northwest
10 Federation of Community Organizations,
11 Northwest Health Law Advocates, Service
12 Employees International Union
13 Washington State Council, The Children's
14 Alliance, Washington Academy of Family
15 Physicians, Washington Association of
16 Churches and Washington State NOW
17 Washington Association of Community
18 and Migrant Health Centers, Washington
19 Protection and Advocacy System

20 On behalf of all Intervener Groups.
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